LIBRARY
SUPREME COURT, U. S.

FILED
MAY 28 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. [redacted] 168

MARION J. BELVEAL, ET AL.,
Petitioners,

vs.

SOCONY MOBIL OIL CORPORATION AND CHARLES B. ATHEY AND JACK D. HODGDEN,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE EIGHTH SUPREME JUDICIAL DISTRICT OF TEXAS AT EL PASO, TEXAS

JOHN J. WATTS
P. O. Box 1031
Odessa, Texas

JOHN G. PATTERSON
2323 Houston Natural Gas Bldg.
Houston, Texas

V. F. KNICKERBOCKER
P. O. Box 1132
Midland, Texas

Attorneys for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

TABLE OF CONTENTS

I. Jurisdiction 2

II. Questions Presented 3

III. Statutes, Rules and Constitutional Provisions Involved 7

IV. Statement of the Matter Involved 9

V. Reasons for Granting Writ 17

Presentation of Federal Questions 54

Conclusion 55

Certificate of Service 55

Appendix—

Exhibit A—Opinion, El Paso Court of Civil Appeals, Eighth Judicial District of Texas A1

Exhibit B—Order Overruling Application of Petitioners for Writ of Error A9

Exhibit C—Order Overruling Motion for Rehearing A9

Exhibit D—Motion for Discovery A11

Exhibit E—Order for Discovery and Producing of a Document, etc. A21

Exhibit EA—Motion for Recall and Stay of Judgment Issued As Mandate A24

Exhibit EF—Order Recalling and Staying Judgment Issued as Mandate A27

Exhibit F—Point No. 12 on Motion for Rehearing A29

Exhibit G—Point No. 19 in Application for Writ of Error A29

Exhibit H—Point No. 20 in Application for Writ of Error A30

Exhibit I—Affidavit of J. K. Brim A31
Exhibit J—Conclusion of Motion for Rehearing A33
Exhibit K—Response of Petitioners Challenging As Untrue Certain Statements Made in the Last Response Filed by Mobil Oil Corporation A39

Table of Authorities

CASES

Ackermann v. *U. S.*, 178 F.2d 983, affirmed 71 S.Ct. 209, 340 U.S. 193, 95 L.Ed. 207, followed in 179 F.2d 236, certiorari granted 70 S.Ct. 996, 339 U.S. 962, 94 L.Ed. 1371 47-48
Adam v. *Saenger*, Tex., 58 S.Ct. 28, 302 U.S. 668, 82 L.Ed. 515, gr'g certiorari 101 S.W.2d 1046, rev. 58 S.Ct. 454, 303 U.S. 59, 82 L.Ed. 649, rehearing denied 58 S.Ct. 640, 303 U.S. 666, 82 L.Ed. 1123, conformed to 119 S.W.2d 687, certiorari denied *Saenger* v. *Adam*, 59 S.Ct. 832, 307 U.S. 628, 83 L.Ed. 1511 10
Alexander v. *Bank of America National Trust and Savings Assn.*, 401 S.W.2d 688 ..... 25, 30
Allison v. *Harrison*, 156 S.W.2d 137 ..... 22, 24
American Broadcasting Co. v. *Federal Communications Commission*, 179 F.2d 437, 85 U.S. App. D.C. 343 47
Armstrong v. *Manzo*, 380 U.S. 545, 14 L.Ed.2d 62 ... 40, 41, 42
Binford v. *Snyder*, 189 S.W.2d 471 17
Box v. *Bates*, 341 S.W.2d 219 23
Cochran v. *Wool Growers Storage*, 160 S.W.2d 904 25
Courseview, Inc. v. *Phillips Petroleum Company*, 312 S.W.2d 197 ..... 12, 52
Goldsmith v. *Cathey*, Civ. App. 1960, 331 S.W.2d 358, ref. n.r.e. 17
Great American Reserve Insurance Company v. *San Antonio*, 391 S.W.2d 41 26
Hart v. *Johnson*, 389 F.2d 239 (1968) 46

In re Oliver, 68 S.Ct. 499, 333 U.S. 257, 92 L.Ed. 682 47

Michigan-Wisconsin Pipe Line Co. v. *Calvert*, Tex., 74 S.Ct. 396, 347 U.S. 157, 98 L.Ed. 583, rehearing denied 10

Michigan-Wisconsin Pipe Line Co. v. *Calvert*, 74 S.Ct. 528, 347 U.S. 931, 98 L.Ed. 1083 10

Mills v. *Alabama*, (1966) 384 U.S. 214, 16 L.Ed.2d 484, 86 S.Ct. 1434 3

Mullane v. *Central Hanover Bank & Trust Co.*, 70 S.Ct. 652, 339 U.S. 306, 94 L.Ed. 865 47

National Surety Company v. *Jackson*, 20 F.2d 644 22

Panhandle Eastern Pipe Line Co. v. *Calvert*, 74 S.Ct. 528, 374 U.S. 931, 98 L.Ed. 1083 10

Pierce v. *Hildebrand*, 103 F. Supp. 396 47

Pratt v. *Shell Petroleum Corporation*, 100 F.2d 833 ....50, 51

Pullman Co. v. *Nelson*, 22 Tex. Civ. App. 223, 54 S.W. 624 29

Radic v. *Fullilove*, 198 F. Supp. 162 .....43, 44-46

Radio Station W.O.W., Inc. v. *Homer H. Johnson*, 89 L.Ed. 2092, 326 U.S. 120 3

Royal Neighbors of America v. *Fletcher*, (Tex. Civ. App.) 30 S.W. 478 29

Southern Pacific Ry. Co. v. *Ulmer*, (Tex. Civ. App.) 282 S.W. 305 29

Townsend v. *Sain*, 372 U.S. 293, 9 L.Ed.2d 770, 83 S.Ct. 745 48

United States v. *Denver Ry. Co.*, 191 U.S. 84, 24 S.Ct. 33, 48 L.Ed. 106 29

U. S. v. *Dillman*, 146 F.2d 572, certiorari denied 65 S.Ct. 1409, 325 U.S. 870, 89 L.Ed. 1989 48

WJR, The Goodwill Station v. *Federal Communications Commission*, 174 F.2d 226, 84 U.S. App. D.C. 1, reversed 69 S.Ct. 1096, 337 U.S. 265, 93 L.Ed. 1353 47

CONSTITUTIONAL PROVISIONS, RULES AND STATUTES

Fifth Amendment, Constitution of the United States 47

Fourteenth Amendment, Constitution of the United States 4, 7, 18, 19, 20, 39, 40, 46, 47, 49, 53, 54

Rule 19, Section 1, Rules of the United States Supreme Court 17

Texas Rules of Civil Procedure—

Rule 166-A 7, 8, 19, 20

Rule 166 12

Rule 167 8

Rule 170 ..... 3, 4, 7, 8, 10, 37, 38, 40

28 U.S.C.A. 1257 ..... 2, 9

28 U.S.C. 1652 7

TEXTS

11 Am. Jur., Sec. 88, pp. 713, 715, 716 ..... 38, 39

Scott on Trusts, Sec. 462, page 3101 20

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. _____

MARION J. BELVEAL, ET AL.,
Petitioners,

vs.

SOCONY MOBIL OIL CORPORATION AND CHARLES B. ATHEY AND JACK D. HODGDEN,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE EIGHTH SUPREME JUDICIAL DISTRICT OF TEXAS AT EL PASO, TEXAS

TO THE HONORABLE MR. JUSTICE WARREN, CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner herein, Marion Belveal, joined by all petitioners of record in this cause, pray that a writ of certiorari issue to review the final action of the El Paso Court of Civil Appeals for the Eighth Judicial District of Texas, entered on the 12th day of June, 1968, which said final

decree reversed and remanded the judgment of the District Court of Pecos County, Texas, for Petitioners, as to the minerals involved for a jury trial but the Court went further and held that the lease of Mobil was good as a matter of law and rendered judgment for Respondent Mobil as to the lease.

The opinion of the Court of Civil Appeals at El Paso is attached as Exhibit A hereto, and has been reported in 430 S.W.2d 529. The Order Overruling the Writ would be Exhibit B, the Order Overruling the Motion for Rehearing appears as Exhibit C, the Motion for Discovery appears as Exhibit D, and the Order for Discovery appears as Exhibit E..

Motion for Recall and Stay of Judgment issued as mandate appears as Exhibit EA and the Order of the Court recalling and staying judgment appears as Exhibit EF of the Appendix.

I.

JURISDICTION

The opinion of the El Paso Court of Civil Appeals was entered on June 12, 1968. The Application for Writ of Error was originally denied after review by the Supreme Court of Texas, on the 31st day of December, 1968. Rehearing of Petitioners' Application for Writ of Error was denied on March 5, 1969.

Jurisdiction to grant this Petition is sustained by Title 28, U.S.C.A., Section 1257, Sub-section 3. As shown heretofore, the Court of Civil Appeals is the highest court of a state in which a decision could be had within the meaning of 28 U.S.C.A., Section 1257. The Application for Writ of Error to the Supreme Court was refused, no reversible error, on December 31, 1968, and Motion for Rehearing of

said application was overruled on March 5, 1969. Certified copies of both orders are included in the transcript which accompanies this application.

The judgment of the El Paso court holding the lease of Mobil good is a final judgment. The judgment of the Texas Court was final since it was determined by said Court as a matter of law that petitioners were not entitled to a Summary Judgment by means of the enforcement of a constructive trust and said court finally held in open defiance of Rule 170, T.R.C.P. that the terms of the rule granting to the trial court the right to enter a default judgment against Respondent Mobil would not be enforced. The El Paso Court further held as a matter of law that a definite form of action had to be instituted in trespass to try title and that new parties who could not be affected by the litigation had to be made parties upon a retrial. These matters partake of the finality of judgment required in order for this Court to have jurisdiction.

Petitioners refer to the decision by this Court in *Radio Station W.O.W., Inc.* v. *Homer H. Johnson,* 89 L.Ed. 2092, 326 U.S. 120-135, as well as the more recent case of *Mills* v. *Alabama,* decided by this Court on May 23, 1966, 384 U.S. 214, 16 L.Ed.2d 484, 86 S.Ct. 1434.

The above cases clearly sustain the jurisdiction of this Honorable Court.

II.

QUESTIONS PRESENTED

1. Whether the Court of Civil Appeals at El Paso can hold as a matter of law that Respondent Mobil's lease is good on a Motion for Summary Judgment in a case such as this, wherein petitioners have been deprived of adequate opportunity of fully developing their case by wit-

nesses in a trial when the issues involved make such procedure the appropriate one, it being the contention of the petitioners that they have been denied due process as guaranted by the Fourteenth Amendment to the Constitution of the United States.

2. Whether Mobil can be sustained in their contention made before the Supreme Court of Texas that Mobil has fully complied with the Trial Court's Order of Discovery when the certified records of legal instruments on file in the United States District Court at Pecos reveal that after judgment had been rendered by the District Court of Pecos County, Texas, in favor of petitioners, Mobil was still refusing to return to the Federal Court the instruments by which they fraudulently acquired petitioners' property.

3. Whether the Respondent, Socony Mobil Oil Company, can refuse to comply with the order of the District Court of Pecos County, Texas, calling for production of certain valuable and material evidence in order that petitioners might fully develop their case as to the invalidity of the lease.

4. Whether a refusal by the El Paso Court to enforce the terms of Rule 170, Texas Rules of Civil Procedure, amounts to a denial of due process under the circumstances of this cause.

5. Whether the El Paso Court of Civil Appeals can permit oil companies to recover lands under the doctrine of constructive trust, whereas individuals are compelled to resort to ancient remedy of trespass to try title without violating the due process clause of the Constitution of the United States under the Fourteenth Amendment insofar as petitioners' rights under said amendment are involved.

6. Whether the Respondent in a fraud case can withdraw the records of an Honorable United States District Court under and by which they accepted the fruits of their agent Brim's fraud, knowingly, and whereby they have fraudulently taken said properties from the petitioners herein, can be sustained by a Texas Court of last resort without even a hearing when the record reveals that they were withdrawn from the Court, and that the defendant Mobil has refused to return these material records that are public records, and are under law required to be kept as a part of the permanent records of said Court.

7. Whether the Supreme Court of the United States will permit Respondent Mobil to perpetrate a fraud upon one of the District Courts over which this Court has supervision by withdrawing records and refusing to return same, these records being a portion of the records called for by the Trial Court's Order of Discovery. This is of extreme importance to Petitioners since that portion of Petitioners' property acquired by the fraud of Mobil's employee Brim acting in behalf of Mobil was thus taken from petitioners. However, the fraud of Mobil extends to all other property recovered by petitioners in the Summary Judgment entered by the District Court of Pecos County, Texas, which judgment was reversed and remanded in part for jury trial, and which judgment was rendered in favor of Respondent Mobil as to the lease.

8. Whether the El Paso Court of Civil Appeals could compel petitioners to file a suit in trespass to try title in a case wherein the pleadings and depositions conclusively demonstrate that the only proper and legal remedy of petitioners was a suit to enforce a constructive trust, and to require the Respondents to reconvey as was done in the judgment of the District Court of Pecos County, Texas.

9. Whether the El Paso Court of Civil Appeals erred in holding that the petitioners in order to recover in this type of suit has to prove title in conformity with the rules announced with reference to trespass to try title causes of action since such rules are not applicable to a suit to enforce a constructive trust.

10. Whether the El Paso Court of Civil Appeals erred in holding that it was necessary to have other parties before the Court that might be innocent purchasers for value in a case where no damage would be done to other purchasers for value without notice by the enforcement of the constructive trust here involved and by the judgment calling for a reconveyance.

11. Whether the El Paso Court of Civil Appeals could hold that the original deeds which were later by agreement of the parties abandoned and new deeds covering the same premises between the same parties were issued in lieu thereof, and in a case wherein the pleadings of petitioners ask generally that all deeds to the lands involved be canceled, could hold that the petition had to be amended and the original deeds had to be included and a new trial had before a jury before relief could be granted to petitioners.

12. Whether the El Paso Court of Civil Appeals erred in sustaining Mobil's Motion for Summary Judgment holding that Mobil's lease was good as a matter of law upon the claim that no fraud was shown in the procurement of the lease when it appears that under the power of attorney here involved, Athey did not have the power to extend the lease.

13. Whether the El Paso Court of Civil Appeals can hold that a lease is good as a matter of law in a case where the Respondent Mobil refused to comply with the orders

of discovery of the Trial Court without excuse or justification so as to deprive petitioners of a hearing upon this cause in the Court below as required by the due process clause of the Fourteenth Amendment of the Constitution of the United States which provides in part as follows:

> ". . . nor shall any state deprive any person of . . . or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

III

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. The Constitutional provision involved in this case is the Fourteenth Amendment to the Constitution of the United States reading as follows:

> "Nor shall any state deprive any person of . . . or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

2. The statutory provision involved in this case is the Rules of Decision Act, 28 U.S.C., Sec. 1652, which reads as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply."

3. The rules involved in this case are Rules 166-A and 170, Texas Rules of Civil Procedure as hereinafter set forth:

Rule 170, T.R.C.P. provides, in part, as follows:

"If any party or an officer or managing agent of a party refuses to obey an order made under Rule 167, the Court may make such orders in regard to the refusal as are just, and among others, the following:

"an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, *or rendering a judgment by default against the disobedient party.*"

Rule 166-A of the Texas Rules of Civil Procedure provides as follows:

"(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof."

Rule 167 of the Texas Rules of Civil Procedure provides as follows:

"Rule 167. DISCOVERY AND PRODUCTION OF DOCUMENTS AND THINGS FOR INSPECTION, COPYING OR PHOTOGRAPHING

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to such limitations of the kind provided in Rule 186b as the court may impose, the court in which an action is pending may order any party to produce and permit the inspection and copying or photographing by or on behalf of the moving party, of any designated documents, papers (except written statements of witnesses), books, accounts, letters, photographs, objects or tangible things, not privileged, which constitute or contain evidence material to any matter in-

volved in the action and which are in his possession, custody, or control; or order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying or photographing the property or any designated object or operation thereon which may be material to any matter involved in the action. The order shall specify the time, place and manner of making the inspection, measurement or survey and taking the copies and photographs and may prescribe such terms and conditions as are just, provided that the rights herein granted shall not extend to the written communications passing between agents or representatives or the employees of either party to the suit, or communications between any party and his agents, representatives, or their employees, where made subsequent to the occurrence or transaction upon which the suit is based, and made in connection with the prosecution, investigation or defense of such claim or the circumstances out of which same has arisen. As amended by order of March 19, 1957, effective Sept. 1, 1957."

IV.

STATEMENT OF THE MATTER INVOLVED

The Court of Civil Appeals for the Eighth Supreme District Court of Texas at El Paso, Texas, reversed the judgment of the District Court of Pecos County, Texas, for Petitioners. The opinion of the Court of Civil Appeals is reported in 430 S.W.2d 529. The Supreme Court of Texas reviewed and refused an application for writ of error, N.R.E., on December 31, 1968. (Certified copy of order appears in the record.) A Motion for Rehearing of Application was overruled March 5, 1969. (Certified copy of order appears in record.) The Court of Civil Appeals is thus the highest court of a state in which a decision can be had, within the meaning of 28 U.S.C.A., Section 1257,

as construed by the Honorable Supreme Court of the United States in:

Michigan-Wisconsin Pipe Line Co. v. *Calvert,* Tex., 74 S.Ct. 396, 347 U.S. 157, 98 L.Ed. 583, rehearing denied;

Panhandle Eastern Pipe Line Co. v. *Calvert,* 74 S.Ct. 528, 347 U.S. 931, 98 L.Ed. 1083;

Michigan-Wisconsin Pipe Line Co. v. *Calvert,* 74 S.Ct. 528, 347 U.S. 931, 98 L.Ed. 1083;

Adam v. *Saenger,* Tex., 58 S.Ct. 28, 302 U.S. 668, 82 L.Ed. 515, gr'g certiorari 101 S.W.2d 1046, rev. 58 S.Ct. 454, 303 U.S. 59, 82 L.Ed. 649, rehearing denied 58 S.Ct. 640, 303 U.S. 666, 82 L.Ed. 1123, conformed to 119 S.W.2d 687, certiorari denied *Saenger* v. *Adam,* 59 S.Ct. 832, 307 U.S. 628, 83 L.Ed. 1511.

This is a case wherein it clearly appears that Respondent Mobil refused to comply with the Trial Court's order of discovery as set out in the Appendix "C" attached to this Petition for Certiorari. It is the contention of the Petitioners here that the refusal of the El Paso Court of Civil Appeals and the Supreme Court of Texas by its action in refusing the Application for Writ of Error, effectively denied to petitioners the rights accorded under the plain and unambiguous provisions of Rule 170, T.R.C.P. as hereinabove set out, and in the alternative, that in the absence of said rule that the action of the Respondent, Mobil, in refusing to comply with the Trial Court's order of discovery deprived Petitioners of a hearing such as is required by law, and that by Mobil's refusal the petitioners have been denied due process under the Fourteenth Amendment of the Constitution of the United States.

This was a suit begun in Pecos County, Texas, and after a jury was duly impaneled, selected and sworn, it was determined that the proper motion for petitioners was

a Motion for Summary Judgment, and all parties filed Motions for Summary Judgment. Thereafter, many hearings were held over a period of a number of weeks in which the arguments of counsel for all parties were duly considered by the court, and the court after full hearing, entered a Summary Judgment on all issues in favor of Petitioners.

It is the contention of the Petitioners here that Athey as trustee for the petitioners and Brim as agent for Mobil entered into an ownership agreement and fraudulent conspiracy with one Jack Hodgden to obtain petitioners' minerals and the lease extension agreement, and we hereinafter set out briefly quotations from the record showing that it was in this manner the lease extension agreement was procured and the minerals of the petitioners fraudulently taken from them by all of the Respondents.

Mobil later entered into the act even more fully by suing Brim, their employee (who had theretofore acted in their behalf in fraudulently procuring the minerals and lease extension agreement), in the United States District Court in Pecos, Texas, and after a short hearing procured a consent decree by which Mobil obtained properties of the petitioners so fraudulently obtained by Brim.

Under Texas law, it is the purpose of the Summary Judgment Act to sever the various causes of action submitted in the pleadings, and if any cause of action entitles one of the parties to judgment then the Court is entitled to enter a Summary Judgment upon the *controlling issues involved.* This the Trial Court did.

The facts of this case plainly show as a matter of law, one, a fiduciary relationship between Athey and petitioners; two, a fraudulent concealment of the conspiracy by Athey, Hodgden and Mobil from petitioners with the

intent to obtain the extension of the lease agreement and the minerals owned by petitioners in Pecos County lands; third, there is an entire absence of any facts which would place the petitioners upon any notice that they had been defrauded; and fourth, petitioners acted well within the two-year period in filing suit after discovery of the fraud.

We respectfully submit that reasonable minds could not differ as to the above propositions under all the evidence in this case, and that hence, as a matter of law, the suit to cancel the lease and to set aside the transaction and to enforce a constructive trust in order that petitioners might recover their minerals was filed within the time required by law, and further petitioners will show that the issues of limitation or laches and no other factual issue remain calling for the intervention of a jury.

Due process has been denied petitioners in that other citizens under the circumstances disclosed here and as shown by the decision of the Supreme Court of Texas in *Courseview, Inc.* v. *Phillips Petroleum Company*, 312 S.W.2d 197, have been granted relief such as is here prayed for. No issue exists as to limitations for jury determination and petitioners are now in dire need of an accounting such as was ordered by the Supreme Court of Texas in *Courseview, supra.*

It is the position of the Petitioners that while allegations of trespass to try title were made, that other allegations seeking to impose a constructive trust on the lands in question were involved and that the Trial Court had the right to enter a Motion for Summary Judgment under Rule 166 *on any cause of action that the Trial Court thought would entitle Petitioners to a Summary Judgment and thus dispose of and render unnecessary a trial on the merits.*

In this case Petitioners should not be required to prove any superior title since Petitioners only ask to be placed in the position that Petitioners originally occupied, and to have their status quo restored since it conclusively appears that whatever title Athey and Hodgden received, they received from Petitioners.

Petitioners here detail concisely the controlling chronological events beginning with the letter received by Petitioners that was mailed by Marion Oil Company to Marion Belveal asking if Petitioners wanted to sell their lands.

In the deposition of M. C. Stickelber, (Marion Oil Company executive who started, at the suggestion of Athey and Hodgden, this fraudulent change of events) commencing on page 35, line 3, Stickelber was asked these pertinent questions:

"Q. Did you have an account in the Enid bank?
"A. No, we did not have an account.
"Q. And I presume that the vice president of that bank would know that you didn't have an account in the Enid bank?
"A. You would have to ask the vice president.
"Q. Later on there was a draft drawn and I think it's been quite clear here, but
"A. I know nothing about the $15,000.00 draft.
"Q. Don't you know that? Haven't we gone over that time and time again here?
MR. KERR: Not about the $15,000.00 draft.
"A. I didn't authorize a $15,000.00 draft.
"Q. And you didn't know anything about it, and you have never seen it? Is that right?
"A. That is correct."

And on page 37 of said deposition, the said Stickelber further testified:

"Q. You did not authorize anyone to put a deposit slip like that, 'Marion Oil Company', deposited there at the bank in Enid? You didn't make any authorization for that deposit slip, did you? (Handing the witness a piece of paper.)

"A. No, I did not."

This was offered in evidence. Stickelber on page 39 of his deposition swore as follows:

"Q. Now the first time you knew about this $15,000.00 draft that they had drawn and this deposit that they have made, purporting to have a check drawn on the Marion Oil Company, is today. Is that right?

"A. This draft that you just showed me?

"Q. Yes. That deposit.

"A. That is the first time I have seen it.

"Q. That is the first time you have heard about it?

"A. Yes."

The above evidence clearly shows that the Respondent Jack Hodgden, at the direction of the Respondent Athey, was simply using Stickelber as a front in order to deceive the Petitioners herein as to whom the true purchaser was to be.

The evidence with reference to the breach of Athey's duties as the Petitioners' trustee demonstrates conclusively and beyond cavil a positive violation of Athey's duties as such trustee as follows, from Athey's deposition:

"Q. So you say that the reason you failed to tell him that you were actually going to be the purchaser was simply because you didn't consider it any of his business?

"A. That is one of the reasons, yes.

"Q. And what is the other reason, the fact that you didn't think you could acquire the property if you did tell him?

"A. I said that did raise a question in my mind.

"Q. Well, a pretty strong one, don't you think?

"A. Well, okay, I will go along with that." (Page 45, line 24 through page 46, line 17.)

The deposition further continued:

"Q. Now, these Belveals that came in, do you recall their names?

"A. The ones that came in the bank?

"Q. Yes, sir, to get their money, their money from you.

"A. No, I don't remember which ones they were. At that time I might not have even been in the bank when they came in. I would just have to look at the drafts. I could tell you from them.

"Q. Well, did you tell any of them that you were the purchaser, the true purchaser of the land?

"A. No.

"Q. Or that Mr. Hodgden or Mr. Brim were purchasing the land?

"A. No.

"Q. Did you, at any time, tell Marion Belveal that you had entered into a purchase agreement with Mr. Brim and Mr. Hodgden on their minerals, prior to the time that they sold the minerals?

"A. No.

"Q. Yet, you had in fact, entered into such an agreement, prior to the time that their minerals were purchased, either written or oral.

"A. An understanding, if you will accept that.

"Q. Well, you knew you were going to be an owner?

"A. Yes, sir.

"Q. And you knew Mr. Brim was going to be an owner?

"A. Yes, sir, because of the way it was proportioned.

"Q. That was the only thing left open then, was the proportion in which the three of you would participate?

"A. Or, if there would be another party." (Page 71, line 23 through page 73, line 3.)

We do not cite further pages of the record, but it has been conclusively shown that Marion Belveal testified that he went to Oklahoma after receipt of the letter to see the Marion Oil Company and was then advised to see a Mr. Jack Hodgden in Tulsa. He further testified that he first saw Athey who said that he thought this looked like a good price, and that he would probably sell his interest. All of the Belveals testified that they would not have parted with the title to their land had they realized that Athey was purchasing the land and an agreement had been entered into between a representative of Socony Mobil and one Jack Hodgden by which inside information which was unquestionably of great value had been entered into.

It is further undisputed by any of the parties before this Court that the drafts and payment of the individual interests of each of the Belveals were drawn upon the Marion Oil Company at Security National Bank in Enid, Oklahoma, and further that the defendant, Charles B. Athey, was executive vice president of said Security National Bank, and in this connection Petitioners refer to the deposition of M. C. Stickelber, being the same M. C. Stickelber who wrote the letter of March 29, 1963, which deposition was taken at the request of the attorneys for the Respondents, Hodgden and Athey, commencing at page 35, line 3.

The plaintiffs' Motion for Discovery is set out as Exhibit "D". The order of the Court granting the Motion for Discovery and calling for the production of documents,

etc., is made a part of this petition and is styled Exhibit "C". The affidavit of Mobil's employee Brim is attached hereto as a part of this Petition for Certiorari and is styled Petitioners' Exhibit "I".

V.

REASONS FOR GRANTING WRIT

The Supreme Court of the United States has attempted to furnish broad guidance with reference to Rule 19, Sec. 1. The reasons enumerated are in part as follows:

> "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decision of this court."

> "Object of summary judgment rule is to permit either party to brush aside groundless allegations in pleadings." *Goldsmith* v. *Cathey,* Civ. App. 1960, 331 S.W.2d 358, ref. n. r. e.

The opinion of the El Paso Court of Civil Appeals and the action of the Supreme Court of Texas in refusing the Application for Writ of Error, n.r.e., is one that is most difficult to understand in view of the announcement of the Supreme Court of Texas in *Binford* v. *Snyder,* 189 S.W.2d 471, concerning the rules of law governing a constructive trust.

At pages 472-473 of the *Binford* opinion, the Supreme Court of Texas held:

> "It is a well settled general rule that if one person obtains a legal title to property not only by fraud *or* by violation of confidence of fiduciary relations, *but* in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impress-

ing a constructive trust upon the property in favor of the one who is in good conscience entitled to it and who is considered in equity as the beneficial owner."

The Supreme Court of Texas has, by virtue of the denial of the Application for Writ of Error refused to give to petitioners the protection of this sacred rule of law, when as has heretofore been pointed out, *the respondent Athey, by judicial admission, obtained this property in an unconscientious manner by concealing from the Belveals that he was to be the real purchaser of the property and by Athey's concealing from petitioners his dealings with one representing Mobil who had a superior knowledge of the value of the property.*

The repudiation of the rule by the refusal of the Application for Writ of Error becomes even more aggravated when the opinion of the El Paso Court of Civil Appeals requires petitioners to have fact issues determined as to whether or not petitioners *can recover minerals obtained in the Federal Court suit by Mobil against Brim. This suit was brought by Mobil with full knowledge of the fraud of Athey and Brim, and of their fraudulent conspiracy to steal the property from the petitioners herein, and Mobil in that case successfully imposed a constructive trust upon the properties obtained fraudulently by their agent Brim.* For the El Paso Court of Civil Appeals and the Supreme Court of Texas to hold that Mobil can by such a device obtain petitioners' property and that petitioners must have a jury find this as a matter of fact is a flagrant and unconstitutional violation of petitioners' rights under the Fourteenth Amendment of the Constitution of the United States.

The Supreme Court of Texas has, by virtue of the refusal of the Application for Writ of Error in this case affirmed the action of the El Paso Court, holding that

Mobil's lease is good as a matter of law in a case *where the record is replete with the failure of Mobil to answer the order of discovery of the trial court which would have revealed the full fraud exercised by Mobil in the procural of the renewal of their lease, and carries the action of the El Paso Court of Civil Appeals and the Supreme Court of Texas to such unbelievable blows as to constitute a denial to petitioners of due process as guaranteed by the Fourteenth Amendment to the Constitution of the United States.*

We believe that such action should constitute an absolute reason calling for the intervention of this Honorable Court by the granting of this writ.

Under the Fourteenth Amendment sacred legal rights exist in petitioners which rights are entitled to be enforced against anyone, including a great and mighty corporation such as Mobil.

The refusal of the Honorable Supreme Court of Texas to grant the Application for Writ of Error and the opinion of the El Paso Court herein constitutes a clear repudiation of law that has many times been declared to be sacred in cases decided by this Honorable Court dealing with constructive trusts of the type here involved.

The El Paso opinion denies to petitioners herein the protection of the law accorded by the Texas summary judgment rules, to-wit: 166 (a).

The action of the Honorable Supreme Court of Texas in approving by refusal of the writ, n.r.e., *the highly unjust, harsh and unreasonable opinion of the El Paso Court of Appeals, places a great and undue legal burden upon petitioners and indeed misplaces the burden of proof when in a summary judgment proceeding such burden should rest on Mobil.* All of this constitutes a denial of due

process as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

This opinion requires petitioners to retry this case in the form of a trespass action to try title suit, and in effect denies petitioners the protection of the law accorded petitioners under Rule 166 (a).

This Honorable Court and the Supreme Court of Texas has many times quoted *Scott on Trusts*, Sec. 462, page 3101, as follows:

> "Many attempts to define or describe a constructive trust would seem to be inadequate because the definition or description is too narrow in its scope and fails to include important types of constructive trusts. Thus, it is frequently said that a constructive *trust is imposed as a remedy for fraud.* Lord Westbury in speaking of the jurisdiction to enforce a constructive trust said: 'It is a jurisdiction by which a Court of Equity, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud. But there are numerous situations in which a constructive trust is *imposed in the absence of fraud,* as for example in the case of mistake, *or in the case of profit made by a fiduciary even though he has not acted fraudulently,* or in the case of an innocent donee of property in which another has an equitable interest. It is sometimes added *that fraud may be 'constructive' as well as actual, which is merely an expression of the idea that a constructive trust may arise in the absence of fraud.*
>
> On the other hand, a constructive trust is sometimes defined to *include only situations where a person in a fiduciary position has acquired or is attempting to acquire a personal benefit from his position.* Thus, Mr. Lewis says: 'A constructive trust is raised by a Court of equity wherever a person, clothed with a

> fiduciary character, gains some personal advantage by availing himself on this situation as trustee.' It is true enough that a constructive trust arises in such a case, but it is not true that a constructive trust arises only in such a case. Judge Cardozo, speaking for the Court of Appeals of New York, has said: *'A constructive trust is then the remedial device through which preference of self is made subordinate to loyalty to others.'* This is not and undoubtedly was not intended to be a definition of a constructive trust, since it includes only those constructive trusts which arise out of an abuse of a fiduciary relation. Judge Cardozo has also said: 'A constructive trust is the *formula through which the conscience of equity finds expression.* When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest equity converts him into a trustee.' "

This portion is clearly in line with all of the decisions dealing with our situation that has heretofore been decided by this Court or by the Supreme Court of Texas.

This Honorable Court's conscience and equity should find expression by requiring that the Summary Judgment requiring that the property illegally taken be reconveyed to petitioners be affirmed by the summary granting of the petition for certiorari and by the affirmance of the judgment of the trial court.

Petitioners had the unquestioned right to have placed in their possession instruments under which the date of the fraud could have been fixed to the satisfaction of the Court of Civil Appeals. Petitioners respectfully submit that the failure of the courts below to give us this right constitutes a refusal to give petitioners a hearing and constitutes and is a denial of due process.

This point and all other points here raised were raised in the lower courts, and will be later discussed, together

with a citation and discussion of decisions by this, the Supreme Court of the United States.

Petitioners submit that it was the express duty of Mobil under the Texas cases cited above, *to expressly instruct Brim not to deal with one party who was representing an undisclosed trust without dealing with the others in the event such conduct might result in injury to those such as the Belveals. This rule Brim, without dispute, violated by Brim's action in obtaining the lease extension agreement* without giving the other people such as the Belveals the same information.

The opinion by the Supreme Court of Texas in *Allison* v. *Harrison,* 156 S.W.2d 137, constitutes more than an abundant answer to Mobil's contentions on the question of estoppel since the *Allison opinion by the Supreme Court of Texas required full knowledge of the Belveals which they undisputedly did not have concerning any knowledge about either the conspiracy or the value of the lease that was extended without their permission or else the Belveals would not have accepted the money paid for the lease.* The Belveals have tendered into Court everything which they have been paid by Mobil for the lease. (Tr. p. 615).

The case of *National Surety Company* v. *Jackson,* 20 F.2d 644, cited by respondent before the El Paso Court, Mobil, shows very clearly that by the acceptance of benefits gained by Brim that *Mobil by such act on their part became estopped* to question Brim's authority. For instance, by Mobil's *acceptance of the fruits of Brim's fraud in the Federal Court case.* The Court, in the *Jackson* case, supra, says as follows:

> "* * * 'It is established principle of law that where a person acts for another, who accepts the fruits of his efforts, the latter must be deemed to have adopted

the methods employed, as he may not, even though innocent, receive the benefits and at the same time disclaim responsibility for the measures by which they were acquired. With the benefits of the contract he must accept the responsibilities.' 21 R.C.L. 932; *Chaffin* v. *Main Island Creek Coal Co.*, 85 W. Va. 459, 102 S.E. 291, 293, 11 A.L.R. 657; *Chicago, Mil. & St. Paul Ry.* v. *U. S.*, 244 U.S. 351, 358, 37 S. Ct. 625, 61 L. Ed. 1184."

It is quite apparent from all of the above that Mobil has ratified Brim's acts and is fully estopped from denying any want of authority for the acts that Brim performed in procuring the extension of lease agreement and in procuring Petitioners' lands for Mobil.

It is likewise apparent that the affidavits submitted in Mobil's Motion for Summary Judgment do not create any issue of fact in that they are *totally insufficient as a matter of law.*

Mobil's affidavits seem to be based upon the vague knowledge of various officers of the production department who attempt to swear generally that *they knew nothing about Brim's fraud,* whereas in truth and in fact, Brim was the only one that they placed in a position to know what Brim did with Athey and Brim made his affidavit on *his own personal knowledge as required by Rule 166A,* and the affidavits of the other parties used by Mobil are not entitled to be considered in this case, under the decision in *Box* v. *Bates,* 341 S.W.2d 219, by Judge Steakley, speaking for the Supreme Court of Texas and this decision is supported by subsequent cases of like import.

By means of *such affidavits,* Respondent Mobil *does not raise either an issue of fact or issue of law,* and therefore, we respectfully submit that this writ should be granted.

The circumstances in this case, as well as the direct evidence, certainly show fraud as a matter of law on the part of Mobil in securing the extension agreement and the lands involved without notice to the Belveals in that the evidence shows that Mobil was contemplating the drilling of two deep test wells some 17,000 feet to the Ellenberger at the time they secured the extension agreement and the lands.

We have heretofore pointed out that the amount of money that was paid for the lease and the question of whether or not the money paid was adequate is not material under the *Allison* case, supra, by the Supreme Court of Texas and the other cases cited therein.

Certainly, the Belveals did not know that Brim was working in a conspiracy with Athey and Hodgden to obtain the property here involved, as well as the lease extension agreement. With such knowledge the Belveals would not have accepted this amount of money for the lease extension agreement or for the land involved herein. This is made clear by the affidavits of Petitioners.

It is quite obvious that the Power of Attorney having been made in August, 1960, *that when Brim said he went up and discussed, at the instructions of Mobil, with Athey the question of getting a Power of Attorney from the Belveals and Athey, that Brim had to be mistaken as to the year he did so and that the year of 1959 or 1960, as shown by the deposition testimony of Brim and the other undisputed circumstances in evidence, was the time when Brim actually advised Athey to get the Power of Attorney and was the time when Brim advised Athey of the value of said properties.* Certainly, Brim had to give Athey the information sworn to in Brim's affidavit or else Athey would not have called the meeting together.

This fact as to Athey's calling this meeting after a conference with Brim is undisputed in this record.

The entire remaining portion of the affidavit and the deposition of Brim shows this to be true and Petitioners respectfully submit that reasonable minds cannot differ as to this point.

The decisions dealing with summary judgments are clearly summarized by the Supreme Court of Texas in *Alexander* v. *Bank of America National Trust and Savings Assn.*, 401 S.W.2d 688, and they all require that the testimony of the Belveals under the undisputed facts appearing from the depositions and affidavits on file in this cause be accepted in that it is *clear, direct and positive and there are no circumstances in evidence tending to discredit or impeach the material portion of such testimony. Cochran v. Wool Growers Storage*, 160 S.W.2d 904.

Mobil had the opportunity to prove which date was correct—1958, 1959 or 1960 or, 1961—but the *remainder of the facts when placed together show that it had to be earlier than the date the Power of Attorney was actually procured because Brim swore that was what he went up there to get, the Power of Attorney, at the request and instruction of Mobil.*

Very frankly, Brim is a party in this case. In fact, he is a defendant. The only reason that judgment is not rendered against Brim is because *Mobil took away all of the property that he acquired as a result of the fraudulent conspiracy.*

The exceptions discussed above become peculiarly important in a case such as this. *Mobil had the means and opportunity of disproving the testimony if it is not true and failed to do so.*

There is no ground for impeaching Brim's testimony as to the date since *Brim's deposition testimony shows that he did not know whether it was 1958, 1959 or 1960 when he began having these communications with Athey.*

Judge Greenhill of the Texas Supreme Court again with clarity reviewed the decisions with reference to summary judgment in *Great American Reserve Insurance Company* v. *San Antonio Plumbing Supply Co.*, 391 S.W.2d 41. On page 46 of the opinion the following appears:

> "This is a summary judgment case; and in answering the above question, we must follow certain rules laid down by this Court, Rule 166-A, Texas Rules of Civil Procedure, provides that summary judgment shall be rendered if it is shown that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The burden of proof is on the movant, and all doubts as to the existence of a genuine issue as to a material fact are resolved against him. *Tigner* v. *First Nat'l Bank*, 153 Tex. 69, 264 S.W. 2d 85 (1954); *Gulbenkian* v. *Penn*, 151 Tex. 412, 252 S.W. 2d 929 (1952). In other words, the evidence must be viewed in the light most favorable to the party opposing the motion. *Valley Stockyards Co.* v. *Kinsel*, 369 S.W. 2d 19. (Tex. Sup. 1963); *Smith* v. *Bolin*, 153 Tex. 486, 271 S.W. 2d 93 (1954). If the motion involves the credibility of affiants or deponents, or the weight of the showings or a mere ground of inference, the motion should not be granted. All conflicts in the evidence are disregarded, and the evidence which tends to support the position of the party opposing the motion is accepted as true. *Cowden* v. *Bell*, 157 Tex. 44, 300 S.W. 2d (1957); *Smith* v. *Bolin*, supra; *Gulbenkian* v. *Penn*, supra. Evidence which favors the movant's position is not considered unless it is uncontradicted. If such uncontradicted evidence is from an interested witness, it cannot be considered as doing more than raising an issue of fact, unless it is clear, direct and

positive and there are no circumstances in evidence tending to discredit or impeach such testimony. *Cochran* v. *Woolgrowers Central Storage Co.*, 140 Tex. 184, 166 S.W. 2d 904 (1943). This exception is especially true where the opposite party has the means and opportunity of disproving the testimony, if it is not true, and fails to do so. *Valley Stockyards Co.* v. *Kinsel*, supra; *James T. Taylor & Son, Inc.* v. *Arlington Ind. School Dist.*, 160 Tex. 617, 335 S.W. 2d 371 (1960); *Owen Dev. Co.* v. *Calvert*, 157 Tex. 212, 302 S.W. 2d 640 at 642 * * *."

In connection with the above, had Mobil presented the agreement called for by the order of the Court (Tr. p. 326) between Mobil and Sun Oil Company providing that Mobil would drill a deep well in the Coyanosa area concerning Section 47, Block OW, Pecos County, Texas; had they presented the letter dated March 22, 1961 pertaining to such agreement that is called for in the Trial Court's Discovery Order; had they presented the papers, documents and things that were produced at exploration conference meetings attended by J. K. Brim, Jr. as to letters, papers, memoranda, documents, maps, surface maps, ownership maps, geophysical maps, geological maps, geophysical information, geological information, reports, opinions and analyses; had Mobil produced the men who attended these meetings with Brim and had Mobil produced this testimony that was called for by the Court's order then there could be no question as to the exact date when Brim was instructed to get the Power of Attorney from Charles B. Athey and there could be no doubt as to the exact date when according to the affidavit of Brim the properties appeared to have great potential for oil and gas production insofar as Mobil's knowledge was concerned.

There could be no doubt if Mobil had shown the oil maps and geophysical structure maps showing the proba-

ble value of same." However, the fact that the date in Brim's affidavit must be regarded by the Court as erroneous is not material when all of the other facts are considered. This contention finds abundant support in this portion of Brim's affidavit fixing the date wherein he said he was instructed to try to get the said Athey to procure a Power of Attorney from all parties so that they could get an extension of a lease involving said property that was about to expire. "I, acting solely as the agent for Mobil and for no one else and not for myself, did contact the said Charles B. Athey and convey to him the information that the property appeared to have great potential as oil and gas producing property, that a well was to be drilled to the Ellenberger and that it would be wise for him to secure a Power of Attorney so that he could represent the other parties, including the Belveals and in order that he might renew and execute leases and I then advised him that a well was to be drilled to the Ellenberger on adjacent property and that said property appeared to be valuable. He advised me that he would contact the various owners for the purpose of getting the Power of Attorney from the Belveals and others and thereafter, he did procure a Power of Attorney and executed an extension of said lease." (Tr., pp. 1250-1251). The word *thereafter* demonstrates that the date *was prior to the time the extension of lease was procured. The fact that all of this was done prior to securing the lease extension is material and controlling and there can be no doubt as to this.*

Therefore, this evidence must stand as conclusive *not as simply raising a fact for the jury* on this issue, but as a *matter of law* since under the decisions by the Supreme Court of Texas as hereinabove set out the failure of Mobil to offer such evidence in the face of the affidavit made

may be considered as strong corroboration of the fact that it was made *prior to the date the lease extension agreement was procured* in that it is undisputed and it would be ridiculous to give the affidavit the construction that Brim would be asking Athey to *get a Power of Attorney in 1961 when the Power of Attorney was procured in 1960 and necessarily it was procured prior to the lease extension agreement.* This is shown conclusively. Reasonable minds cannot differ as to this. The El Paso Court was under a duty to take these material facts into consideration in a determination as to the time when such information was furnished as shown by these cases. *Southern Pacific Ry. Co.* v. *Ulmer,* (Tex. Civ. App.) 282 S.W. 305; *Pullman Co.* v. *Nelson,* 22 Tex. Civ. App. 223, 54 S.W. 624; *Royal Neighbors of America* v. *Fletcher,* (Tex. Civ. App.) 30 S.W. 478; *United States* v. *Denver Ry. Co.,* 191 U.S. 84, 24 S.Ct. 33, 48 L.Ed. 106.

In other words, *the date of 1961 is absolutely incompatible and does not make sense with the remaining portion of the affidavit or the deposition and other situations and circumstances in evidence by deposition,* affidavits, etc. in this case.

Whatever the date, it is obvious that Mobil unquestionably then knew about the property and wanted it badly, both at the time of lease extension agreement as well as at the time of the purchase of the Belveals' interest in the lands involved.

It is obvious that Mobil instructed Brim to commit this fraud, else why should their attorneys *risk contempt of court proceedings rather than comply with the Court order to produce these material instruments that would have answered this question.*

Having so failed to answer except through the hearsay affidavits of Tom Sealy and others, all of which affidavits the plaintiffs-appellees made proper motion to strike, Mobil is in no position to now make the contention that there was no proof that this happened after securing the lease extension agreement.

As said by the Waco, Texas Court of Civil Appeals in *Alexander* v. *Bank of America National Trust and Savings Association*, 401 S.W.2d 688:

> "It is impossible for us to decide from that incomplete record that the judgment was erroneous. *Torrey* v. *Cameron*, 74 Tex., 187, 11 S.W. 1088. It is presumed the omitted deposition established its propriety. *Armstrong* v. *West Texas Rig Company*, Tex. Civ. App., 339 S.W. 2d 69, 73, writ ref. n.r.e.; Locke v. J. H. Marks Trucking Co., Tex.Civ.App., 318 S.W. 2d 1; *Stovall* v. *Scofield*, Tex. Civ. App., 325 S.W. 2d 221; *McFarland* v. *Connally*, Tex.Civ.App., 252 S.W. 2d 486, 488."

The Trial Court had the right in determining whether this transaction occurred prior to 1960 and prior to the lease extension agreement based upon all the affidavits, depositions and unimpeached and uncontradicted testimony in this case to consider all of these circumstances. This points clearly to the error of the Court of Civil Appeals in holding that the fraud occurred long after the lease was procured.

Mobil did not file relevant, material and admissible affidavits and hence, it is now beyond Mobil's power to claim that any of these matters *would have established a date in their favor.*

The above cases establish a strong case for the Petitioners, one that was conclusive, and that was never in any way rebutted by any evidence of the Respondents.

Mobil, having chosen to take this attitude rather than to obey the mandate and order of discovery of the trial court when Mobil could have done so, is now estopped from claiming that the information was not known to Mobil prior to the date of the lease extension agreement.

It is quite obvious that the leases dealing with the Sun Oil Company agreement would have been most enlightening, as well as all the other important information sought and such information would have established that the date of Mobil's knowledge was prior to the lease extension agreement and would have corroborated Brim's testimony and affidavit.

It is submitted by Petitioners that this is the reason that the attorneys for Mobil *risked contempt of Court rather than produce the evidence.*

As we have heretofore pointed out, *by Federal Court order* Petitioners procured one of the contracts with Humble which showed that for 50% of the proceeds Mobil was willing to put up all of the money and expense necessary to drill 17,000 feet to the Ellenberger in the early part of March, 1961.

Mobil's agreement appears to have been entered into on June 27, 1961 (Tr. 922). It was Exhibit No. 31 and is one of the exhibits that Mobil has thus far refused to produce. The Humble agreement is Exhibit No. 31, but Mr. Browder, of counsel for Mobil, told the Court that he would prefer not to introduce the exhibit into evidence. This is plainly shown on page 923 of the Transcript.

Why, we might ask this Honorable Court, was counsel for Mobil unwilling to make this exhibit a matter of public record? Exhibit No. 31, by Court order, is now a part of the record in this cause.

The entire pattern of conspiracy and fraud as between all of the respondents is now clear. It is a matter upon which we respectfully submit reasonable minds, as to the material and controlling facts, cannot differ. Hence, this was not a case for a jury since any finding made would of necessity have been set aside notwithstanding the verdict of a jury by the Trial Court since such findings would have been without any evidence of probative force to sustain them.

We respectfully submit that the only reason counsel for Respondent, Mobil, had in mind in not wanting to make the exhibit a matter of record, and *the only reason that Mobil had for withdrawing the federal court records under an oral agreement and the only reason Respondent Mobil now has for contesting the production and return of the records to the Federal Court and the only reason Mobil has for refusing and failing to comply with the Trial Court's order of discovery in this case is that Mobil knows that these instruments will show that this* conspiracy was entered into by Brim and master-minded by Mobil in order that Brim might do for Mobil the very things he was trained to do and that was to acquire valuable property and leases and these instruments show conclusively that the fraud begins prior to the time when the Power of Attorney and the lease extension agreement was procured.

An innocent purchaser for value does not hide public records or documents or behave in such a manner as have all Respondents, and when the cases are considered by this Honorable Court that we have herein cited, justice calls for the granting of this writ.

To go a little further, we do not believe that reasonable minds could differ that Athey and Hodgden knew nothing about the wells that were to be drilled until they

were so informed by Brim, Mobil's agent. What circumstances are there in record from the testimony of anyone that would indicate that they received any information of value of material importance except from Brim.

If this opinion stands, we have reached the age in our jurisdiction *that Courts can act without either reason or explanation by placing their judicial stamp of approval or brand upon this kind of fraud* without any opportunity being afforded petitioners to fully develop the evidence and to cross-examine and examine the witnesses.

What interest would Athey and Hodgden have had or what could have prompted them to get the meeting together whereby Athey could deliver his sales pitch and procure the Power of Attorney to represent all of the people involved herein, including the Belveals, had it not been as Brim's deposition and affidavit show, that Brim was instructed by Mobil to have Athey call this meeting for the purpose of obtaining this Power of Attorney?

Further (when the evidence of Marion Belveal, who was acting for the other Petitioners, is considered), does it not appear without dispute that Athey told the Belveals and all others as the basis of talking them into giving Athey a Power of Attorney in the meeting called by Athey *that he would keep the Belveals informed as to wells drilled or about to be drilled in the vicinity of their property that might affect the value of the Belveal lands or any deals that might interest them in the counties including Pecos County that was covered by the Power of Attorney?* (Tr., p. 1193).

Again, it is shown by the affidavit of Marion Belveal who was acting as the agent for all of the appellees, and this appears without dispute, *that he did not expect Athey to make an extension of lease or renewal of any lease. Cer-*

tainly the Power of Attorney did not give Athey the power to determine the price to be received for the lease.

What evidence is there in this record that disputes this testimony? This, the Court of Civil Appeals failed to supply in its opinion, and nothing was added by the blanket denial without any written opinion of the Supreme Court of Texas when that court denied the application of petitioners for writ of error.

It is quite obvious that the extension agreement was to the advantage of Mobil since they would have spent at least $1,200,000.00 to drill a well in order to hold the lease without getting an extension.

In the lower court we asked Respondent Mobil and the Court of Civil Appeals and Supreme Court of Texas to tell *us under the record in this case how reasonable minds could differ upon the proposition that it was easier for Brim, acting in Mobil's behalf to sell one man who had a Power of Attorney, than it was to sell all of the others in spite of the fact that it was the nondelegable duty of Mobil to see that Brim's information was not used to harm the others, including the Belveals* since Mobil knew from the very start of Brim's contact with Athey that Athey occupied a fiduciary relationship toward the Belveals.

We further respectfully submit that reasonable minds could not differ upon the proposition that Brim *was acting solely for Mobil even under the contentions of Mobil up until the early part of 1962 at a time prior to the time that Brim entered into the ownership agreement with the other appellants in 1962.*

We further respectfully submit that reasonable minds could not differ when the material facts are considered upon the fact that Mobil first wanted the extension agreement

and needed time to make deals with Sun and Humble which they were apparently engaged in making for many months prior to March, 1961, at which time a letter exhibit to Sun Oil was introduced into evidence (then withdrawn) from the Federal Court case before Mobil would want to either drill a well or before they would want to purchase the Belveal interest. It is a matter of which this Court should take judicial knowledge that this is the manner in which purchasers and developers of oil property such as Mobil and all others operate.

Mobil was concerned with *getting as much from everybody as they could* based on their geological information as to the great value of these properties and it required time and months of dealing for Mobil to do this.

The Respondents' argument in the court below that they have been harmed by the failure of the Belveals to discover their fraud with respect to the lease agreement falls by the wayside since such a claim is preposterous and no attempt has been made to create such a claim, save by the general affidavits of Mobil that they have spent millions for improvements. We therefore respectfully submit that Mobil is liable as a joint conspirator with Athey and Hodgden in procuring the Petitioners' property by fraud since no one, save Mobil, under evidence in this case, who had knowledge of this information, could have set this chain of fraudulent acts into motion, finally culminating in the disaster to the Petitioners of which complaint is here made.

The undisputed circumstances in this record demonstrate that it is true that Mobil could have begun drilling operations but before doing so Mobil wanted to get control of more acreage which Sun and Humble had in their possession and the argument that had Mobil done so the Belveals would have been $72,423.21 poorer *does not make sense.*

since had the Belveals not executed the extension of lease agreement, they would have been millions of dollars richer without the expense and bother of this lawsuit either to them or to this Court.

Likewise, when the statement is made on page 25 of the Brief filed in the court below that Mobil gained nothing, save a two-year lease, Mobil by this act *gained all of the time necessary to acquire this other acreage and made millions as a result of their drilling during the period of this extension* which they made with Sun and Humble.

The advantakes to Mobil are clearly evident as a matter of common, as well as judicial, knowledge.

This Court can surely see through this kind of reasoning. The reasoning of Mobil in this connection, on p. 28 of their Brief, as filed in the El Paso Court, *challenges common sense and all of the facts in this record* and certainly should not have been taken as being true by the Trial Court or by this Court in that the record on its face conclusively shows the contrary in such a manner that reasonable minds could not differ as to its effect.

It is shown by Brim's deposition that he was division staff landman for Mobil from January 1, 1960 to February 1, 1963 (p. 8, line 16 to p. 10, line 7 of Brim's deposition), and that he was supposed to keep abreast of the latest developments and acquisitions of competitors in the oil industry and to interpret the significance of those developments as related to Mobil Oil Company and during this time counsel with the division land man in the evaluation of land acquisition proposals. (Tr. 1071) (Brim's deposition, p. 10, line 23 to p. 11, line 9). On deposition, Brim further testified that at these conferences during this period of time that the related activities referred to things concerning exploration matters, as shown by his testimony heretofore quoted.

Brim expressly admitted that *he first met Athey in 1958.* (Tr. 1078-1079, heretofore quoted)

All of these facts when considered together show *that it was prior to the lease extension agreement that Brim furnished this information to Athey.* Reasonable minds cannot differ in this regard, and hence, the Motion for Summary Judgment was correctly entered and there was nothing for the jury to decide. A verdict to the contrary by a jury would of necessity be set aside on a motion for judgment notwithstanding the verdict.

Petitioners believe that they have met the burden imposed on Petitioners by law to show by specific records that there was fraud and unlawful conspiracy in the negotiating, signing and delivering and in the payment of the May, 1961, extension of lease agreement and we will go further and say that Petitioners have shown fraud coming from the headquarters of Mobil in their instructions to Brim to procure the Power of Attorney by which the fraud could be committed, notwithstanding the evasive opinion of the El Paso Court and the general statement in the opinion of the Court that Petitioners failed in their proof as a matter of law.

It is extremely important that this Honorable Court read the Order of Discovery as prepared by the Trial Court and as reflected by the transcript, page 326. This order of discovery has been attached to this Petition and appears as Appendix "C".

We respectfully submit that after this is done that it will be readily apparent that Mobil's refusal to comply with the Trial Court's order of discovery fully justified the trial court in entering a default judgment as to Mobil under the terms of Rule 170, T.R.C.P., both as to the minerals and as to the lease.

Of what importance are sacred statutes if our Texas Courts refuse to give them life and meaning by judicial enforcement and observance?

Rule 170, T.R.C.P. is not to be ignored by the whims and caprices of the attorneys for Mobil, or by Mobil itself.

Rule 170 is a sacred rule dealing with the ability of our courts to enforce orders involving discovery and the opportunity of litigants in courts to examine the evidence of the adversary and a failure to give this rule effect by action of the Supreme Court of Texas in denying the Application for Writ of Error, n.r.e. in this cause constitutes a denial of due process of law. This clearly calls for the intervention of this Court if justice under law is to remain upon the earth.

The importance of Constitutional Law and the Fourteenth Amendment which we ask this Honorable Court to enforce is well stated in *11 Am. Jur.*, p. 713, Sec. 88, as follows:

> "Since the Constitution is intended for the observance of the judiciary as well as the other departments of government and the judges are sworn to support its provisions, *the courts are not at liberty to overlook or disregard its commands. It is their duty in authorized proceedings to give effect to the existing Constitution and to obey all constitutional provisions irrespective of their opinion as to the wisdom of such provisions.*"

11 American Jurisprudence eloquently proclaims on page 715 as follows:

> "Consequently *state courts*, as well as Federal courts, are under an obligation to guard and *enforce every right secured by the Federal Constitution;* and *it is the duty of the state courts as much as of the Federal courts*, when the question of the validity of a state statute is necessarily involved as being in alleged

violation of any provision of the Federal Constitution, to decide that question and hold the law void if it violates that instrument."

Again in the same volume, the text in commenting upon this power as being essential to protection of liberty which necessarily carries with it the protection of property rights states as follows, on page 716:

> "The principle in the government of England that the Parliament is omnipotent does not prevail in the United States, and every law in this country must conform, in the first place, to the Constitution of the United States, then to the Constitution of its particular state, and so far as it is an infraction of either, it is void. The principle which thus permits the courts to pronounce an act of the legislature null and void, because it conflicts with the provisions of the Constitution, seems to be peculiar to American institutions and has been declared to be one of the strongest barriers ever devised *against the tyrannies of political assemblies.* The Supreme Court has declared that it is the duty of courts to be watchful for the *constitutional rights of the citizens and against any stealthy encroachments thereon.* Their motto should be obsta principiis. The perpetuity of our institutions and the liberty which is enjoyed under them depend in no small degree upon the power given the judiciary to declare null and void all legislation clearly repugnant to the supreme law of the land.
>
> It has been said that the judiciary should *protect the rights of the people with great care and jealousy,* not only because this is its duty, but also because in times of great popular excitement *it is usually their last resort.*"

If an amendment or constitutional provision or statute or rule violates the Fourteenth Amendment, then it is the duty of this Supreme Court of the United States to declare such a provision void.

It necessarily follows by logical analogy that in a case such as this that wherein the 14th Amendment gives to the petitioners sacred legal rights which have been unquestionably disregarded by the opinion of the El Paso Court of Civil Appeals and the Supreme Court of Texas that this Court should act to protect petitioners' constitutional rights.

Petitioners have heretofore demonstrated that the Motion for Discovery as signed by the Trial Court and as made by the Petitioners' attorney was calculated to lead to the discovery of the date of the inception of fraud of Mobil in procuring the lease.

Mobil, without justification, refused to comply with the Trial Court's orders. The petitioners were entitled upon such a failure to have the Trial Court enter under the express terms of Rule 170, T.R.C.P. a default judgment against Mobil.

This rule has been wholly ignored, *and Mobil was well aware of the penalty for their disobedience of the Trial Court's order.*

Petitioners cannot understand under what theory Mobil can claim or any Court can hold that Mobil's lease under such circumstances is valid as a matter of law or otherwise.

It has been appropriately held by the Supreme Court of the United States in the fairly recent case of *Armstrong v. Manzo*, 380 U.S. 545, 14 L.Ed.2d 62, a decision wherein a District Court Judgment had been affirmed setting aside an adoption decree by the El Paso Court of Civil Appeals, 371 S.W.2d 407, and thereafter, by the Supreme Court of Texas by the refusal of an application for writ of error in substance that a fundamental requirement of due process is the opportunity to be heard.

This Court further held that an opportunity for a hearing such as is required by due process must be granted at a meaningful time and in a meaningful manner. To use the words of Mr. Justice Stewart, we quote from the opinion on page 65, as follows:

> "In disposing of the first issue, there is no occasion to linger long. It is clear that failure to give the petitioner notice of the pending adoption proceedings violated the most rudimentary demands of due process of law. 'Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' *Mullane* v. *Central Hanover Tr. Co.*, 339 U.S. 306, at 313, 94 L ed 865, at 872, 70 S. Ct. 652. 'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken* v. *Meyer*, 311 US 457 (85 L ed 278, 61 S Ct 339, 132 ALR 1357); *Grannis* v. *Ordean*, 234 US 385 (58 L ed 1363, 34 S Ct 779); *Priest* v. *Las Vegas*, 232 US 604 (58 L ed 751, 34 S Ct 443); *Roller* v. *Holly*, 176 US 398 (44 L ed 520, 20 S Ct 410) . . .' Id, at 314, 94 L ed at 873. Questions frequently arise as to the adequacy of a particular form of notice in a particular case. See, e.g., *Schroeder* v. *City of New York*, 371 US 208, 9 L ed 2d 255, 83 S Ct 279, 89 ALR 2d 1398; *New York* v. *New York, N.H. & H.R. Co.* 344 US 293, 97 L ed 333, 73 S Ct 299; *Walker* v. *Hutchinson City*, 352 US 112, 1 L ed 2d 178, 77 S Ct 200; *Mullane* v. *Central Hanover Tr. Co.*, supra. But as to the basic requirement of notice itself there can be no doubt, where, as here, the result of the judicial proceeding was permanently to deprive a legitimate parent of all that parenthood implies. Cf. *May* v. *Anderson*, 345 US 528, 533, 97 L ed 1221, 1226, 73 S Ct 840."

The Court further states with clear emphasis:

> "Had the petitioner been given the timely notice which the Constitution requires, the Manzos, as the moving parties, would have had the burden of proving their case as against whatever defenses the petitioner might have interposed. See *Jones* v. *Willson,* 285 S.W. 2d 877; *Ex Parte Payne,* 301 S.W. 2d 194. It would have been incumbent upon them to show not only that Salvatore Manzo met all the requisites of an adoptive parent under Texas law, but also to prove why the petitioner's consent to the adoption was not required. Had either side offered any evidence, those who initiated the adoption proceedings could not have prevailed.
>
> "Instead, the petitioner was faced on his first appearance in the courtroom with the task of overcoming an adverse decree entered by one judge, based upon a finding of non-support made by another judge. As the record shows, there was placed upon the petitioner the burden of affirmatively showing that he had contributed to the support of his daughter to the limit of his financial ability over the period involved. The burdens thus placed upon the petitioner were real, not purely theoretical. For 'it is plain that where the burden of proof lies may be decisive of the outcome.' *Speiser* v. *Randall,* 357 US 513, 525. 2 L ed 2d 1460, 1472, 78 S Ct 1332. Yet these burdens would not have been imposed upon him had he been given timely notice in accord with the Constitution.
>
> "A fundamental requirement of due process is 'the opportunity to be heard.' *Grannis* v. *Ordean,* 234 US 385, 394, 58 L ed 1363, 1369, 34 S Ct 779. It is an opportunity which must be granted at a meaningful time and in a meaningful manner. The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place. His motion should have been granted."

It is quite apparent from the reading of the above case that had the Order of Discovery been complied with Petitioners could have shown to the satisfaction of the Court or at least raise a jury issue as to when the fraud first began by which Mobil fraudulently procured the lease.

Considering the affidavit of Brim which is before this Court, and which we again ask this Court to read, it is quite apparent that this fraud began prior to the time that Athey procured his Power of Attorney, and was in existence at the time that Mobil fraudulently procured its lease.

The question as to when Mobil discovered the value of the lease and when they begin plans to secure and acquire the properties of Petitioners through Athey could likewise have been shown had the Order of the Trial Court for Discovery been complied with.

This Supreme Court of Texas has affirmed the Court of Civil Appeals' opinion contrary to the right of the Petitioners to have a *full development of the evidence as required by the rules of discovery and said court and the El Paso Court has placed the burden of proof upon petitioners which should have been placed upon Mobil in a summary judgment proceeding.* Again this is a denial of due process calling for the granting of this writ and summary affirmance of the trial court's judgment.

This is by analogy the clear import of the *Manzo* case, supra.

Due process and the rules of discovery, under such circumstances, become meaningless if Petitioners are not given an opportunity to develop the truth.

The decision in *Radic* v. *Fullilove,* 198 F. Supp. 162 is likewise clearly in point upon this question of petitioners' right to examine the documents called for in the Order of Discovery and to have returned and filed in the Federal

Court the documents by which Mobil acquired petitioners' property in order that any semblance of a judicial trial in accordance with the rules might have been had. We quote from the *Radic* case, supra, at page 164 as follows:

> "The question before this Court is whether plaintiff was accorded procedural due process, that is, whether the procedure was essentially fair (*Cakmar* v. *Hoy*, 9 Cir., 265 F. 2d 59; *United States ex rel. Dolenz* v. *Shaughnessy*, 2 Cir., 200 F. 2d 288; *Chao-Ling Wang* v. *Pilliod*, 7 Cir., 285 F 2d 517.
>
> "There is no doubt from the record in this case that plaintiff was allowed a full and fair opportunity to put forward his evidence proving, or tending to prove, that he would be subject to physical persecution if sent to Yugoslavia. However, the evidence to the contrary which was apparently considered by the Commissioner in his final determination, was submitted in a file which plaintiff was not even permitted to see. No opportunity was given plaintiff to explain, rebut, contradict or impeach the documents in question. No contention is made that the documents in the file were confidential because their disclosure would be harmful to the security or safety of the United States. Under these circumstances, this case does not come within the scope of the ruling in *Jay* v. *Boyd*, 351 U.S. 345, 76 S Ct 919, 100 L. Ed. 1242. No attempt had been made to show that the file upon which the Federal officials relied here in reaching their decision was kept outside the record under any circumstances which made such action reasonable. To the contrary it appears that defendant arbitrarily and capriciously drew a cloak of secrecy around such evidence as is claimed to be contrary to plaintiff's contentions. And this was done without offering any reason or rational explanation for the refusal to disclose the evidence which patently was the very basis for the denial of plaintiff's application. For all that appears in the record now before the Court this vital file could have been made up of clippings from magazines and newspapers of gen-

eral circulation in the United States. The United States Supreme Court expressly pointed out that no such situation existed in *Jay* v. *Boyd*, supra. (See: 351 US 358, 76 S. Ct. 927). It was clearly shown in that case that certain particular information was kept confidential because its disclosure would have been prejudicial to the public interest, safety or security.

"From the record before me in this case, it is patent that plaintiff has not been afforded procedural due process here. Under our form of Government, the right to a hearing embraces not only the right to present evidence in support of one's position, but also a reasonable opportunity to know the claims of the opposing party with the privilege of seeking to refute those claims. The right to be heard and the right to contest opposing evidence are equal and coexisting rights, and both are essential to procedural due process (*Morgan* v. *United States*, 304 U.S. 1, 58 S. Ct. 773, 82 L. Ed. 1129. The right to contest the opposing evidence was nullified in the instant case by the refusal to plaintiff of an opportunity to inspect the documents in the file which had been considered by the administrative agents. This right was, in my opinion, inviolate in the absence of a showing that the disclosure of those documents would be harmful to the security or well being of the United States of America (See: *Boudin* v. *Dulles*, 98 U.S. App. D.C. 305 235 F 2d 532 and *Dulles* v. *Nathan*, 96 U. S. App. D.C. 190, 25 F. 2d 29.)

"We have for a guide in this field the case of *Parker* v. *Lester*, 9 Cir., 227 F.2d 708. In that case were six seamen, all American citizens. It appeared that if plaintiffs were erroneously granted the documents they sought, there would be a danger that in time of war the United States might suffer disastrous losses as a result of the intentional blowing up of munitions vessels in American harbors. Less spectacular sabotage of the Merchant Marine might also take place. On the other hand, it appears that if the documents were erroneously denied, the plaintiff seamen would be deprived of the opportunity to work in the particular

calling of their choice without good reason. Judge Murphy, in the lower Court (See: D.C., 112 F. Supp. 433), allowed the sources of certain information to be kept confidential, holding that otherwise practically all of the sources of information of the F.B.I. and other Federal security agencies would be dried up. His decision was reversed, and it was held that as a matter of procedural due process the plaintiff seamen were entitled to confrontation and cross-examination of confidential informants (*Parker* v. *Lester,* supra)."

In *Hart* v. *Johnson,* 389 F.2d 239 (1968), the court stated:

> "In S. J. Groves & Sons v. Ohio Turnpike Commission, 315 F.2d 235, 237 (6th Cir. 1963), cert. den., 375 U.S. 824, 84 S.Ct. 65, 11 L.Ed.2d 57 we said:
>
> > 'This Court has on several occasions expressed the view that a trial judge should be slow in disposing of a case of any complexity on a motion for summary judgment, that while such a judgment wisely used is a praiseworthy and timesaving device, yet such prompt dispatch of judicial business is neither the sole nor the primary purpose for which courts have been established, and that a party should not be deprived of an adequate opportunity to fully develop his case by witnesses and a trial, when the issues involved make such procedure the appropriate one. Knapp v. Kinsey, 249 F.2d 797, 801-803, C.A. 6th; Bohn Aluminum & Brass Corp. v. Storm King Corp., 303 F.2d 425, 427, C.A. 6th; Begnaud v. White, 170 F.2d 323, 327, C.A. 6th; Estepp v. Norfolk & W. Ry. Co., 192 F.2d 889, C.A. 6th; Bellak v. United Home Life Ins. Co., 211 F.2d 280, 283, C.A. 6th; Hoy v. Progress Pattern Co., 217 F.2d 701, 704, C.A. 6th. See: Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967; White Motor Co. v. United States, 372 U.S. 253, 83 S.Ct. 696, 9 L.Ed.2d 738.' "

A fundamental requisite of due process of law is the opportunity to be heard. U.S.C.A. Const. Amend. 14.

Mullane v. *Central Hanover Bank & Trust Co.*, 70 S.Ct. 652, 339 U.S. 306, 94 L.Ed. 865. *Pierce* v. *Hildebrand*, 103 F.Supp. 396.

A person's rights to reasonable notice of a charge against him and an opportunity to be heard in his defense are basic, and such rights include, as a minimum, a right to examine witnesses against him, to offer testimony and to be represented by counsel. U.S.C.A., Const. Amend. 14. *In re Oliver*, 68 S.Ct. 499, 333 U.S. 257, 92 L.Ed. 682.

The guarantee of hearing implied in the due process clause of the Fifth Amendment applies as well to issues of fact as to issues of law. U.S.C.A., Const. Amend. 5. *American Broadcasting Co.* v. *Federal Communications Commission*, 179 F.2d 437, 85 U.S. App. D.C. 343.

An essential element of due process is an opportunity to be heard before reaching of a judgment, and judgment without opportunity to be heard is judicial oppression. *WJR, The Goodwill Station* v. *Federal Communications Commission*, 174 F.2d 226, 84 U.S. App. D.C. 1, reversed 69 S.Ct. 1096, 337 U.S. 265, 93 L.Ed. 1353.

"Hearing" required by due process refers not only to a hearing on truth of allegations made by complainant, but also to hearing on question of law as to sufficiency, of allegations made by complainant. U.S.C.A., Const. Amend. 5. *WJR, The Goodwill Station* v. *Federal Communications Commission*, 174 F.2d 226, 84 U.S. App. D.C. 1, reversed 69 S.Ct. 1097, 337 U.S. 265, 93 L.Ed. 1353.

The right of appeal from a merely erroneous judgment is no part of due process, but the right of a litigant to a trial in accordance with the forms of law and with an opportunity to present his claim or defense, if he desires to do so, is a vital part of due process. *Ackermann* v. *U. S.*,

178 F.2d 983, affirmed 71 S.Ct. 209, 340 U.S. 193, 95 L.Ed. 207, followed in 179 F.2d 236, certiorari granted 70 S.Ct. 996, 997, 339 U.S. 962, 94 L.Ed. 1371.

The basic elements of a full and fair "hearing" include the right of each party to be apprised of all the evidence upon which a factual adjudication rests, plus the right to examine, explain, or rebut all such evidence. *U.S.* v. *Dillman,* 146 F.2d 572, certiorari denied, 65 S.Ct. 1409, 325 U.S. 870, 89 L.Ed. 1989.

The Supreme Court of the United States in *Townsend* v. *Sain,* 372 U.S. 293, 9 L.Ed.2d 770, 83 S.Ct. 745 (this decision is a habeas corpus proceeding but as we have heretofore pointed out the amendment is equally applicable to property rights), demonstrates conclusively that this Court will assume jurisdiction if this Court believes that state courts have ignored constitutional rights in such a way as to violate due process.

In *Townsend* v. *Sain,* supra, on page 787 of the opinion, Mr. Chief Justice Warren with great clarity declared,

> "This Court has consistently held that state factual determinations not fairly supported by the record cannot be conclusive of federal rights. *Fiske* v. *Kansas,* 274 US 380, 385, 71 L ed 1108, 1110, 47 S Ct 655; *Blackburn* v. *Alabama,* 361 US 199, 208, 209, 4 L ed 2d 242, 249, 80 S Ct 274. Where the fundamental liberties of the person are claimed to have been infringed, we carefully scrutinize the state-court record. See, e.g., *Blackburn* v. *Alabama* (US) supra; Moore v. Michigan, 355 US 155, 2 L ed 2d 167, 78 S Ct 191. The duty of the Federal District Court on habeas is no less exacting.
>
> "However, the obligation of the Federal District Court to scrutinize the state-court findings of fact goes farther than this. Even if all the relevant facts were

presented in the state-court hearing, it may be that the fact-finding procedure there employed was not adequate for reaching reasonably correct results. If the state trial judge has made serious procedural errors (respecting the claim pressed in federal habeas) in such things as the burden of proof, a federal hearing is required. Even where the procedure employed does not violate the Constitution, *if it appears to be seriously inadequate for the ascertainment of the truth, it is the federal judge's duty to disregard the state findings and take evidence anew.* Of course, there are procedural errors so grave as to require an appropriate order directing the habeas applicant's release unless the State grants a new trial forthwith. Our present concern is with errors which, *although less serious, are nevertheless grave enough to deprive the state evidentiary hearing of its adequacy as a means of finally determining facts upon which constitutional rights depend.*"

There is still another important facet of due process under the Fourteenth Amendment that should be considered by this Honorable Court. The Fourteenth Amendment guarantees equal protection of the laws to all classes of citizens.

The law has been definitely established with reference to oil companies that a constructive trust can be imposed under circumstances where the companies have had agents unjustly enrich themselves without the knowledge of the oil company.

Shall we have one rule saying that the doctrine of constructive trust cannot be used by individuals but that it can be used by oil companies as a remedial procedure?

The Honorable Supreme Court of Texas has, by virtue of the refusal of the Application for Writ of Error in this cause, affirmed the holding of the El Paso Court that re-

quires the petitioners to seek as their sole remedy, the form of trespass to try title action and one that must be submitted to a jury for determination as to the mineral rights of petitioners. This has reversed the action of the trial court in imposing a constructive trust upon the property here involved as was called for in the Summary Judgment.

To make ourselves clearer, we will quote from a few cases involving oil companies, wherein oil companies have recovered under the doctrine of constructive trust.

In *Pratt* v. *Shell Petroleum Corporation*, 100 F.2d 833, in dealing with a geologist that had been unfaithful to his company, the Court said, and we quote at length from the opinion from page 837:

> "It is further insisted that a trust should not have been imposed for the reason that there was no proof that plaintiff suffered detriment or damage as the result of defendant acquiring the mineral interests. In order to warrant the imposition of a constructive trust, the evidence that a fiduciary relationship existed, and that it was breached must be clear, convincing, and trustworthy. *Colorado & Utah Coal Company* v. *Harris*, 97 Colo. 309, 49 P.2d 429. But such a trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.' *Beatty* v. *Guggenheim Exploration Co.*, 225 N.Y. 380, 122 N.E. 378, 380; *Quinn* v. *Phipps*, 93 Fla. 805, 113 So. 419, 54 A.L.R. 1173. *It was not necessary for plaintiff to show that it suffered detriment, injury, or damage. The law was indubitably contravened by the creation of a situation which lent inducement or temptation for wrongdoing; and a court of equity does not concern itself with the question whether the opportunity was embraced and the prin-*

cipal suffered actual injury. Hoyt v. *Latham,* 143 U.S. 553, 12 S. Ct. 568, 36 L.Ed. 259; *Robertson* v. *Chapman,* 152 U.S. 673, 14 S.Ct. 741, 38 L.Ed. 592; *United States* v. *Dunn,* 268 U.S. 121, 45 S.Ct. 451, 79 L.Ed. 876; *Turner* v. *Kirkwood,* 10 Cir., 49 F.2d 590; *Daus* v. *Short,* supra; *Selwyn & Co.* v. *Waller,* 212 N.Y. 507, 106 N.E. 321, L.R.A. 1915B, 160. The proof was clear, convincing, and trustworthy that a fiduciary relationship existed between the parties, and that defendant breached the duty which it imposed upon him for his own benefit. He acquired the legal title to the royalty interests and the leases in such circumstances that he cannot in good conscience retain the beneficial interests. That was enough to convert him into a trustee. *Robertson* v. *Chapman,* supra; *Trice* v. *Comstock,* 8 Cir., 121 F. 620, 61 L.R.A. 176; *Cunningham* v. *Pettigrew,* 8 Cir., 169 F. 335; *Beatty* v. *Guggenheim Exploration Co.,* supra.

Defendant argues very earnestly that in some instances plaintiff had abandoned all of its leases upon land in a given area before he acquired royalty interests in it, and that in others plaintiff had abandoned all of its leases in a specified territory before the case was tried. The fallacy of the argument is that it rests upon the postulate that actual detriment or damage must be shown in a case of this kind. Repeating, a fiduciary relationship and a breach of duty which it exacts warrants the imposition of a constructive trust where the holder of the legal title cannot in good conscience retain the beneficial interests without regard to the question of pecuniary damages."

Again, petitioners submit that due process has been denied petitioners herein by the action of the El Paso Court and by the action or inaction of the Supreme Court of Texas.

The Court in the *Pratt* case, supra, dealing with the question of laches, held as follows:

> "Plaintiff has not failed to exert reasonable diligence in ascertaining the facts concerning the several interests; there is no showing that the position of defendant changed to his disadvantage during the delay; and for these reasons the doctrine of laches is without application."

It is quite clear that the respondents herein are estopped from pleading laches and *that no delay* in the filing of the suit worked a disadvantage to any of the respondents.

We believe that the decision by Justice Walker of the Supreme Court of Texas, in *Courseview, Incorporated* v. *Phillips Petroleum Co.*, 312 S.W.2d 197, correctly stated the rule with reference to the limitation in a case such as this. In that case, Justice Walker said, on page 205, as follows:

> "Some of our intermediate courts have expressed the view that when a relationship of trust and confidence exists, the defrauded party is under no duty to use any means to discover the fraud until he has notice of facts that would put a person of ordinary prudence on inquiry. See *Atkins* v. *Dodds,* Tex.Civ.App., 121 S.W.2d 1010 (wr. Dis. agr.); *Dean* v. *Dean,* Tex.Civ. App., 214 S.W. 505 (no writ)."

> "It is perhaps more accurate to say that the existence of a relation of trust and confidence does not change the rule that diligence in discovering the fraud is required but does affect the application of the rule. See *Edsall* v. *Edsall,* Tex. Civ. App., 238 S.W. 2d 285 (wr. ref. N.R.E.); *First State Bank of Bangs* v. *Visart,* Tex. Civ. App. 259 S.W. 987 (no writ); 28 Tex. Jur. Limitation of Actions, Sec. 73, p. 162. By entering into fiduciary relations, the parties consent as a matter of law to have their conduct measured by the standards of the finer loyalties exacted by courts of equity. See *Johnson* v. *Peckham,* 132 Tex. 148, 120 S.W. 2d 786, 120 A.L.R. 720. The fiduciary relationship is therefore

one of the circumstances to be considered in determining whether fraud might have been discovered by the exercise of reasonable diligence. It may excuse the defrauded party from taking action that would be required in an arm's-length transaction or from making as prompt or searching investigation as might otherwise be expected. In some situations there is no legal duty to use means available for discovering the fraud, and this is such a case."

For this Honorable Supreme Court of last resort to take any other view renders the Summary Judgment Statute and the magnificent purpose of Rules of Civil Procedure as well as rights accorded under the 14th Amendment of no avail. For instance, Mobil filed a suit to impose a constructive trust in the United States Federal Court which is referred to in the Application for Writ of Error before this Court against Brim and received all of the property fraudulently procured by Brim as a result of conspiracy which he had entered into with Respondents Athey and Hodgden. How, then, can this Honorable Court affirm the action of the lower courts in holding that petitioners should be compelled to establish a superior title to Mobil in a trespass to try title suit when the only remedy sought by Petitioners is to ask that the status quo be enforced and that they be placed in the position of Athey and Hodgden in this case?

To hold otherwise is tantamount to disregarding this conspiracy which is even greater and plainer than the Billy Sol Estes case, wherein Respondent Athey got Respondent Hodgden to do his dirty work as the first part of the scheme to keep Athey from being known as the true purchaser of the property of the Belveals.

Any rule or statute concerning jurisdiction of a Texas court to act must yield since same would be unconstitu-

tional if said rules or statutes conflicted with the inherent right and power of this Court to grant writs of error and to set aside judgments of lower courts of appeal in cases wherein petitioners have been denied due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States as in the case at bar. This case, therefore, becomes of such great and unusual importance to the jurisprudence of America that it becomes the duty of this Honorable Court to grant the petition for certiorari and to summarily affirm without further hearing the Judgment of the Trial Court.

PRESENTATION OF FEDERAL QUESTIONS

Federal questions were here involved and directly presented to the Court of Civil Appeals in Point No. Twelve on Motion for Rehearing to the Court of Civil Appeals and appear herein as Exhibit F in the Appendices.

The matter was further preserved and presented to the Supreme Court of Texas in our Application for Writ of Error as Points No. Nineteen and Twenty and appear herein as Exhibits G and H in our Appendices.

The Affidavit of J. K. Brim appears as Exhibit I in our Appendices.

The conclusion of the Motion for Rehearing in the Court of Civil Appeals likewise preserves the federal questions. That conclusion appears as Exhibit J in our Appendices.

The response of petitioners challenging as untrue certain statements made in the last response filed by Mobil Oil Corporation in the Supreme Court of Texas definitely not only preserve this federal question, but should move any Court to the granting of this Petition for Certiorari. A portion of that response appears as Exhibit K in our Appendices.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari be granted.

JOHN J. WATTS
P. O. Box 1031
Odessa, Texas
JOHN G. PATTERSON
2323 Houston Natural Gas Bldg.
Houston, Texas
V. F. KNICKERBOCKER
P. O. Box 1132
Midland, Texas

By John G. Patterson
JOHN G. PATTERSON
Attorneys for Petitioners

CERTIFICATE OF SERVICE

A copy of the foregoing Petition for Writ of Certiorari was furnished counsel for Respondents as follows: Mr. William L. Kerr, P. O. Drawer 511, Midland, Texas; Mr. W. B. Browder, Jr., P. O. Box 670, Midland, Texas; Mr. Rush Moody, P. O. Box 670, Midland, Texas; Mr. J. K. Brim, Jr., P. O. Box 215, Sulphur Springs, Texas; Mr. Jack Akin, P. O. Box 633, Midland, Texas; Mr. E. B. Mitchell, Jr., P. O. Box 1029, Enid, Oklahoma, by mailing same to all of the above named counsel at their correct post office addresses as above listed on this the 27 day of May, 1969.

John G. Patterson
JOHN G. PATTERSON